

Jamie Balson, #028587
Crime Victims' Rights Attorney
Arizona Coalition to End Sexual & Domestic Violence
2800 N. Central Ave., Suite 1570
Phoenix, AZ 85004
(602) 279-2900
jamie@acesdv.org

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	R-16-0031
PETITION TO DELETE RULE 20, TO ADD)	
RULE 24.1 AND TO RENUMBER RULES)	COMMENT OF THE
24.1, 24.2, 24.3 and 24.4 ARIZONA RULES)	ARIZONA COALITION TO END
OF CRIMINAL PROCEDURE)	SEXUAL & DOMESTIC VIOLENCE
)	

The Arizona Coalition to End Sexual & Domestic Violence (hereinafter ACESDV) respectfully submits this comment in support of the Maricopa County Attorney's Office's (hereinafter MCAO) petition to delete Rule 20. MCAO, through its Chief Deputy, has filed a rule change petition that would, if granted, delete Rule 20 and move the post-verdict provision of that rule to "Post-Verdict Proceedings" as new Rule 24.1.

I. Background

ACESDV, founded in 1980, is a nonprofit organization whose purpose is to increase public awareness of sexual and domestic violence, enhance the safety of and services for victims of sexual and domestic violence, and to end sexual and domestic violence in Arizona.

ACESDV's mission to lead, advocate, educate, and collaborate to prevent and end sexual and domestic violence in Arizona is carried out through providing direct services to victims of sexual and domestic violence, providing education and training to law enforcement, social workers, and other professionals, by offering technical assistance to those who provide direct services to victims of sexual and domestic violence, by engaging in public policy advocacy on these important issues, and by collaborating with leaders, citizens, and communities to solve pressing issues facing victims of sexual and domestic violence.

ACESDV has an interest in protecting the rights of crime victims which are guaranteed by the Victims' Bill of Rights (VBR), Arizona Constitution, art. II, § 2.1, the Arizona Revised Statutes, and the Arizona Rules of Criminal Procedure. ACESDV has a special interest in the proposed rule change because, as currently enacted, Rule 20 results in infringements of victims' rights and victims are left without viable remedy, or even review of the court's decision even in instances of manifest error.¹

II. Discussion/Analysis

ACESDV supports MCAO's assertion that Rule 20 as presently enacted: 1) violates the State's right to a jury trial—and permits a judge to unilaterally divest the jury of its fact finding duties; and 2) strips a victim of her or his rights to justice and due process. While MCAO's first assertion is important, it is the second assertion that falls within the purview of ACESDV's mission and gives rise to the present comment. Moreover, if a judge grants a defendant a judgment of acquittal pursuant to Rule 20, a victim's "right to justice and due process" has not only been violated, but the victim's right to notice, to be heard, and to participate in a conference prior to counts being dismissed are also violated. Such action specifically implicates A.R.S. §13-4436 (effect of failure to comply with victims' rights), A.R.S. §13-4418 (statutes shall be construed liberally to protect victims' rights), and A.R.S. §13-4437 (B) (providing the victim a right to recover damages from a governmental entity for violations of victims' rights).

A. Liberal interpretation of crime victims' rights is required

As a preliminary matter, the authorities governing victims' rights specifically provide that the rights are intended to be very broad and every protection available be afforded to crime victims. A.R.S. § 13-4418 states that "[Chapter 40: Crime Victims' Rights] shall be liberally construed to preserve and protect the rights to which victims are entitled." Arizona Rules of Criminal Procedure sets forth "[t]hese rules shall be construed to preserve and protect a victims' rights to justice and due process."² Arizona's Constitution is even more expansive, it allows for the amendment or repeal of rules—such as Rule 20—that directly violate victims' rights: "[t]o

¹ *Evans v. Michigan*, 133 S. Ct 1069 (2013), at 1081

² Ariz. R. Crim. Pro., R39(b)

1 have all rules governing criminal procedure and the admissibility of evidence in all criminal
2 proceedings protect victims' rights and to have these rules be subject to amendment or repeal by
3 the legislature to ensure the protection of these rights.”³ Despite these liberal policies regarding
4 victims’ rights, when a pre-verdict judgment of acquittal is granted victims’ rights fall by the
5 wayside as set forth below.

6 **B. Victims have a right to notice, prior to any dismissal being granted**

7 A.R.S. §13-4409, in conjunction with Arizona Constitution, article II, §2.1 (A)(3) and
8 Arizona Rule of Criminal Procedure 39(b)(3), addresses a victim’s right to notice. This right
9 holds that the victim must be provided with notice regarding criminal proceedings. Rules 39
10 (b)(3) states specifically that the victim must be afforded “reasonable notice.” In regards to the
11 issue at hand, while in most cases the victim will be aware that the trial is ongoing, it is not
12 logical to expect that every victim will be available to attend every minute of every trial.
13 However, if the court intends to grant a Rule 20 motion and dismiss the case, the victim must be
14 afforded reasonable notice to attend the hearing. A victim is entitled to notice of the “date, time
15 and place.” Here, “reasonable notice” of the looming dismissal must be provided to the victim.
16 It is not sufficient to say that “reasonable notice” was afforded because the victim knew trial
17 would be ongoing on that day. To be meaningful, “reasonable notice” must specifically include
18 the type of proceeding. In the event that a judge intends to grant a Rule 20 dismissal, a victim
19 must be notified that the case will be permanently dismissed and that she or he has a right to be
20 present and heard. In this scenario, it is the court’s duty to make the notification.

21 A.R.S. § 13-4417 specifically addresses the court’s duty to provide certain notifications.
22 It states, “the court and all agencies that are responsible for providing notices to the victim shall
23 establish and maintain a system for the receipt of victim request for notice.” The legislature
24 clearly anticipated that the court would be responsible for certain notifications. Moreover, Rule
25 39 (f)(3) specifically requires that “if the victim has not been notified as requested, the court
26 should not proceed unless public policy, the specific provisions of a statute, or the interests of
27 due process otherwise require.” In the instance of a pre-verdict Rule 20 dismissal, none of these

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³ Ariz. Const., art. II, §2.1. (A) (11).

1 apply and the victim must be afforded notice. Along with a right to notice, a victim has a right to
2 be heard at the criminal proceedings.

3 **C. Victims have a right to be heard, prior to any dismissal being granted**

4 Throughout Chapter 40, Arizona Revised Statutes and Arizona Constitution, article II,
5 §2.1, a victims' right to be heard is preserved. It is Rule 39(b)(7), however, that specifically
6 addresses a victims right to be heard regarding dismissal of charges. Rule 39(b)(7) states that "in
7 connection with any decision involving...dismissal of the charges" the victim has "the rights
8 [sic] to be heard at any such proceeding..." Nevertheless, when a judge makes the decision to
9 grant a Rule 20 motion and dismiss the case pre-verdict, *the victim is afforded no opportunity to*
10 *be heard regarding the dismissal.* Admittedly, Rule 39(b)(7) does also address the victims' right
11 to confer with the prosecution. However, it would be illogical to afford the victims the right to
12 be heard regarding dismissal only in conjunction with her or his right to confer with the
13 prosecution (discussed a greater length below). Victims are afforded the right to be "heard at
14 any such proceeding" that involves "dismissal of the charges." This right properly extends when
15 a judge unilaterally dismisses the charges; the victim has a right to be present and heard
16 regarding the dismissal.

17 **D. Victims have a right to confer, prior to any dismissal being granted**

18 A.R.S. §13-4419, in conjunction with Arizona Constitution, article II, §2.1 (6) and Rule
19 39(b)(7), focuses on a victim's right to confer with the prosecution regarding dismissal of a case.
20 This right must be provided to the victim "before any disposition of the case." Presumably,
21 when the statutory language was drafted the right to confer included only the prosecution
22 because the *court's* ability to dismiss a case pre-verdict in violation of victims' rights was not
23 considered. Lending additional support to this presumption is that a pre-verdict judgment of
24 acquittal was—and remains—a rare occurrence. It simply did not garner as much attention, if
25 any, as the dismissal of the case by the prosecution. Nevertheless, it is illogical to believe that
26 when a judge decides to unilaterally dismiss a case that a victim would not be provided the
27 opportunity to confer regarding the dismissal and be heard regarding such.

28 When considering a pre-verdict Rule 20 judgment of acquittal as it affects victims' rights
a curious issue arises: since it is the judge and not the prosecution who is deciding to dismiss the

case, should the victim be afforded the right to meet and confer with the judge? A liberal reading of the victims' rights laws and rules would indicate so. Admittedly, this scenario is problematic. Nevertheless, the victim still has the right to confer regarding a dismissal *and* to be heard regarding the dismissal of a case.

E. Repercussions of victims' rights violations

A pre-verdict Rule 20 judgment of acquittal without providing the victim(s) the right to justice, due process, notice, to be heard, and to confer, specifically implicates A.R.S. §13-4436 (effect of failure to comply with victims' rights), A.R.S. §13-4418 (statutes shall be construed liberally to protect victims' rights)(discussed above), and A.R.S. §13-4437 (B) (providing the victim a right to recover damages from a governmental entity for violations of victims' rights).

1. Effect of failure to comply with victims' rights

The effect of failure to comply with victims' rights is essentially a "do-over." The victim can request a reexamination hearing pursuant to A.R.S. §13-4436 wherein the victim can ask the court to "reconsider any decision that arises from a proceeding in which the victim's right was not protected." However, in the event of a Rule 20 judgment of acquittal this is not a practical remedy for victims. As discussed in greater length in its petition, MCAO points out that pursuant to *Evans v. Michigan* a new trial on the matter has been deemed double jeopardy.⁴ In this instance, the defendant's right not to be subject to double jeopardy likely would trump the victim's right for reexamination of the judgment of acquittal. This does not square with the protections afforded—and intended—by victims' rights.

2. Intentional, knowing, or grossly negligent violation of victims' rights

Allowing Rule 20 to stand as is may have additional implications under A.R.S. §13-4437 (B). This statute permits victims to recover damages from "a governmental entity responsible for intentional, knowing or grossly negligent violation of the victims rights... ." In the event of a pre-verdict Rule 20 judgment of acquittal, if specific care is not taken to comply with *all* victims' rights, a victim's only remedy would be to sue the government for the victims' rights infringements. There is no appellate remedy. This is a dangerous proposition, and likely not

⁴ MCAO Petition, page 4, 6.

1 contemplated when the statutes were written. Eliminating Rule 20 would effectively diminish
2 this possibility as it would afford the victim the opportunity for reexamination under A.R.S. §13-
3 4436 and also would permit appellate review of any judgment of acquittal because the dismissal
4 would occur post-verdict.

5 **3. Potential for victims' rights violations as a result of pre-**
6 **verdict Rule 20 judgment of acquittal is great**

7 Note that in its petition, MCAO lists several cases in which judges disagreed about
8 whether the evidence was sufficient for a jury to find that an element was proven beyond a
9 reasonable doubt.⁵ A cursory look at these cases shows that many of the listed cases are victim
10 cases; had the judges granted pre-verdict Rule 20 motions, the victims in those cases would have
11 been stripped of his or her rights. *State v. Just*,⁶ was a second degree murder case; *State v.*
12 *Paoletto*,⁷ was a kidnapping, armed robbery, and sexual assault case; and *State v. Fischer*,⁸ was a
13 second degree murder case.

14 **III. Conclusion**

15 Permitting a case to be dismissed without allowing the victim the opportunity to exercise
16 her or his rights—rights afforded by the by the Victims' Bill of Rights (VBR), Arizona
17 Constitution, art. II, § 2.1, the Arizona Revised Statutes, and the Arizona Rules of Criminal
18 Procedure—works against the spirit of the law and the specific provisions requiring that the law
19 and rules be applied liberally to protect a victim's rights.

20 Based on the forgoing, ACESDV strongly supports MCAO's petition to delete Rule 20
21 and to move the post-verdict provision of that rule to Post-Verdict Proceedings as new Rule 24.1

22 **RESPECTFULLY SUBMITTED this 14 day of March, 2016.**

23
24 /s/ _____
25 Jamie A. Balson
26 Crime Victims' Rights Attorney
27 Arizona Coalition to End Sexual & Domestic Violence

28 ⁵ MCAO Petition, page 5.

⁶ 138 Ariz. 534 (1983).

⁷ 133 Ariz. 412 (1982).

⁸ 2015 WL 5880536 (App. 2015).

1 Filed electronically with the
2 Clerk of the Arizona Supreme Court
3 this **14** day of **March, 2016**.
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